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DEPARTMENT OF AGRICULTURE

Office of the Secretary

7 CFR Part 1

[Docket No. USDA-2020-0006]

RIN 0503-AA64

Review and Issuance of Agency Guidance Documents

AGENCY: Office of the Secretary, USDA.

ACTION: Final rule.

SUMMARY: This final rule amends the U.S. Department of Agriculture’s administrative regulations by adding procedural regulations for the review and issuance of agency guidance documents.

DATES: [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

FOR FURTHER INFORMATION CONTACT: Mr. Stephen O’Neill, Office of Budget and Program Analysis, USDA, 1400 Independence Avenue SW., Washington, DC 20250-1400, (202) 720-0038.

SUPPLEMENTARY INFORMATION:

I. Background

On October 9, 2019, the President signed Executive Order 13891, “Promoting the Rule of Law Through Improved Agency Guidance Documents.” Section 4 of the order directs that, “[w]ithin 300 days of the date on which [the Office of Management and Budget] issues an

implementing memorandum under section 6 of this order, each agency shall, consistent with applicable law, finalize regulations, or amend existing regulations as necessary, to set forth processes and procedures for issuing guidance documents.”

In accordance with that direction, the United States Department of Agriculture (USDA) is amending its administrative regulations in 7 CFR part 1 to add a new Subpart Q, “Review and Issuance of Agency Guidance Documents.” These new regulations codify the process, review, and other requirements set forth in section 4 of the executive order.

II. Notice and Comment Not Required

This rule relates to internal agency management. Therefore, pursuant to 5 U.S.C. 553(a)(2), notice of proposed rulemaking and opportunity to comment are not required.

III. Procedural Requirements

Executive Order 12866

The Office of Management and Budget (OMB) has determined that this regulatory action does not meet the criteria for significant regulatory action pursuant to Executive Order 12866, Regulatory Planning and Review. Additionally, because this rule does not meet the definition of a significant regulatory action, it does not trigger the requirements contained in Executive Order 13771.

The regulations added by this rule are intended to improve the internal management of USDA. As such, it is for the use of USDA personnel only and is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its agencies or other entities, its officers or employees, or any other person. Accordingly, we expect the economic impact of this rule, if any, to be minimal.

Regulatory Flexibility Act

The provisions of the Regulatory Flexibility Act relating to an initial and final regulatory flexibility analysis (5 U.S.C. 603, 604) are not applicable to this final rule because USDA was not required to publish notice of proposed rulemaking under 5 U.S.C. 553 or any other law. Accordingly, a regulatory flexibility analysis is not required.

Paperwork Reduction Act

This final rule imposes no new reporting or recordkeeping requirements necessitating clearance by OMB.

List of Subjects in 7 CFR Part 1

Administrative practice and procedure, Antitrust, Claims, Cooperatives, Courts, Equal access to justice, Fraud, Freedom of information, Government employees, Indemnity payments, Lawyers, Motion pictures, Penalties, Privacy.

Accordingly, we are amending 7 CFR part 1 as follows:

PART 1 -- ADMINISTRATIVE REGULATIONS

1. The authority citation for part 1 continues to read as follows:

Authority: 5 U.S.C. 301, unless otherwise noted.

2. Add Subpart Q, consisting of §§ 1.900 through 1.911, to read as follows:

Subpart Q—REVIEW AND ISSUANCE OF AGENCY GUIDANCE DOCUMENTS

Sec.

1.900 General.

1.901 Requirements for clearance.

1.902 Public access to effective guidance documents.

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1.904 Procedures for guidance documents identified as “significant” or “otherwise of importance to the Department’s interests.”

1.905 Designation procedures.

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1.907 Petitions for guidance.

1.908 Rescinded guidance.

1.909 Exigent circumstances.

1.910 Reports to Congress and GAO.

1.911 No judicial review or enforceable rights.

§ 1.900 General.

(a) This subpart governs all United States Department of Agriculture (USDA) employees and contractors involved with all phases of issuing USDA guidance documents.

(b) These procedures apply to all newly issued guidance documents and, in certain respects, guidance documents already in effect.

(c)(1) For purposes of this subpart, the term “guidance document” is defined as in Executive Order 13891 and means an agency statement of general applicability, intended to have future effect on the behavior of regulated parties, that sets forth a policy on a statutory, regulatory, or technical issue, or an interpretation of a statute or regulation.

(2) The term is not confined to formal written documents; guidance documents may come in a variety of forms, including (but not limited to) letters, memoranda, circulars, bulletins, advisories, and may include video, audio, and Web-based formats. See Office of Management and Budget’s (OMB) Bulletin 07-02, “Agency Good Guidance Practices,” 72 Fed. Reg. 3432, 3434, 3439 (January 25, 2007) (“OMB Good Guidance Bulletin”)

(d) “Guidance document” does not include the following:

(1) Rules promulgated pursuant to notice and comment under 5 U.S.C. 553 or similar statutory provisions;

(2) Rules exempt from rulemaking requirements under 5 U.S.C. 553(a);

(3) Rules of agency organization, procedure, or practice;

(4) Decisions of agency adjudications under 5 U.S.C. 554 or similar statutory provisions;

(5) Internal guidance directed to the issuing agency or other agencies that is not intended to have substantial future effect on the behavior of regulated parties;

(6) Internal executive branch legal advice or legal opinions addressed to executive branch officials;

(7) Agency statements of specific applicability, including advisory or legal opinions directed to particular parties about circumstance-specific questions (e.g., case or investigatory letters responding to complaints, warning letters), notices regarding particular locations or facilities (e.g., guidance pertaining to the use, operation, or control of a government facility or property), and correspondence with individual persons or entities (e.g., congressional correspondence), except documents ostensibly directed to a particular party but designed to guide the conduct of the broader regulated public;

(8) Agency statements that do not set forth a policy on a statutory, regulatory, or technical issue or an interpretation of a statute or regulation, including speeches and presentations, editorials, media interviews, press materials, or congressional testimony that do not set forth for the first time a new policy or interpretation;

(9) Grant solicitations and awards; or

(10) Contract solicitations and awards.

(e) The term “significant guidance document” means a guidance document that may reasonably be anticipated to:

(1) Lead to an annual effect on the economy of \$100 million or more or adversely affect in a material way the U.S. economy, a sector of the U.S. economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities;

(2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;

(3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or

(4) Raise novel legal or policy issues arising out of legal mandates, the President’s priorities, or the principles of E.O. 12866.

(f) The term “significant guidance document” does not include the categories of documents excluded in writing by OMB’s Office of Information and Regulatory Affairs (OIRA).

(g) Significant guidance documents must be reviewed by OIRA before issuance and must demonstrate compliance with the applicable requirements for regulations or rules, including significant regulatory actions, set forth in Executive Orders 12866, 13563, 13609, 13771, and 13777.

§ 1.901 Requirements for clearance.

Each USDA agency that issues a guidance document shall ensure that the guidance document satisfies the following requirements:

(a) The guidance document complies with all applicable statutes and regulations;

(b) The guidance document identifies or includes:

- (1) The term “guidance” or its functional equivalent;
 - (2) The issuing agency and agency component, as applicable;
 - (3) A unique identifier, including, at a minimum, the date of issuance and title of the document and its Z-RIN, if applicable;
 - (4) The activity or entities to which the guidance document applies;
 - (5) Citations to applicable statutes and regulations;
 - (6) A statement noting whether the guidance document is intended to revise or replace any previously issued guidance and, if so, sufficient information to identify the previously issued guidance; and
 - (7) A short summary of the subject matter covered in the guidance document at the top of the document.
- (c) The guidance document does not use mandatory language, such as “shall,” “must,” “required,” or “requirement,” unless the language is describing an established statutory or regulatory requirement or is addressed to USDA employees or contractors and does not foreclose the Department’s consideration of positions advanced by non-Federal entities.
- (d) The guidance document is written in plain and understandable English;
- (e) All guidance documents include a clear and prominent statement declaring that the contents of the document do not have the force and effect of law and are not meant to bind the public in any way, and the document is intended only to provide clarity to the public regarding existing requirements under the law or agency policies.

§ 1.902 Public access to effective guidance documents.

Each USDA agency that issues guidance documents shall:

(a) Ensure all guidance documents in effect are on its website in a single, searchable, indexed database, and available to the public. Guidance documents that do not appear on the website are considered rescinded.

(b) Note on its website that guidance documents lack the force and effect of law, except as authorized by law or as incorporated into a contract.

(c) Maintain and advertise on its website a means for the public to comment electronically on any guidance documents that are subject to the notice-and comment procedures of this subpart and to submit requests electronically for issuance, reconsideration, modification, or rescission of guidance documents in accordance with this subpart.

(d) Designate an office to receive and address complaints from the public that a USDA agency is not following the requirements of OMB's Good Guidance Bulletin or is improperly treating a guidance document as a binding requirement.

§ 1.903 Good faith cost estimates.

(a) Each USDA agency that issues a guidance document shall, to the extent practicable, make a good faith effort to estimate the likely economic impact of the guidance document to determine whether the document might be significant.

(b) When a USDA agency is assessing or explaining whether it believes a guidance document is a "significant guidance document," it shall, at a minimum, provide the same level of analysis that would be required for a determination of major/not major under the Congressional Review Act. When an agency determines that a guidance document will be significant, the agency shall conduct and publish an assessment of the potential costs and benefits of the regulatory action (which may entail a regulatory impact analysis) of the sort that would accompany a significant rulemaking, to the extent reasonably possible.

§ 1.904 Procedures for guidance documents identified as “significant” or “otherwise of importance to the Department’s interests.”

(a) For guidance documents proposed to be issued by an agency, if there is a reasonable possibility the guidance document may be considered “significant” or “otherwise of importance to the Department’s interests,” or if the agency is uncertain whether the guidance document may qualify as such, the agency shall email a copy of the proposed guidance document (or a summary of it) to the Office of Budget and Program Analysis (OBPA) for review and further direction before issuance. Each proposed guidance document determined to be significant or otherwise of importance to the Department’s interests must be approved by the Mission Area Under Secretary before issuance. In such instances, OBPA shall obtain a Z-RIN and coordinate submission of the proposed guidance document to departmental reviewers as deemed necessary. For purposes of this rule, even if not “significant,” a guidance document shall be considered “otherwise of importance to the Department’s interests” if it may reasonably be anticipated to:

(1) Relate to a major program, policy, or activity of the Department or a high-profile issue pending for decision before the Department;

(2) Involve one of the Secretary’s top policy priorities;

(3) Garner significant press or congressional attention; or

(4) Raise significant questions or concerns from constituencies of importance to the Department, such as Committees of Congress, States or Indian tribes, the White House or other departments of the Executive Branch, courts, consumer or public interest groups, or leading representatives of industry.

(b) USDA shall submit significant guidance documents to OMB for coordinated review. In addition, USDA may determine that it is appropriate to coordinate with OMB in the review of guidance documents that are otherwise of importance to the Department's interests.

(c) If the guidance document is determined by the proposing agency or OBPA to be not significant, the proposing agency shall issue the guidance document through its standard process.

§ 1.905 Designation procedures.

(a) To obtain a designation from OIRA, USDA agencies shall prepare and submit to OBPA a designation request for guidance documents. Designation requests must include the following information:

- (1) A summary of the guidance document; and
- (2) The agency's recommended designation of "not significant," or "significant," as well as a justification for that designation.

(b) OBPA shall seek a significance determination from OIRA for guidance documents, as appropriate, in the same manner as for rulemakings. Prior to publishing a guidance document, and with sufficient time to allow OIRA to review the document in the event that it is designated "significant," USDA shall provide OIRA with an opportunity to review the designation request or the guidance document, if requested, to determine if it meets the definition of "significant" under Executive Order 13891.

§ 1.906 Notice-and-comment procedures.

(a) Except as provided in paragraph (b) of this section, a proposed USDA guidance document determined to be a "significant guidance document" shall be subject to the following informal notice-and-comment procedures. The issuing agency shall publish a notice in the *Federal Register* announcing that a draft of the proposed guidance document is publicly

available, shall post the draft guidance document on its website, shall invite public comment on the draft document for a minimum of 30 days, make the public comments available for public review on its website, and shall prepare and post a public response to major concerns raised in the comments, as appropriate, on its website, either before or when the guidance document is finalized and issued.

(b) The requirements of paragraph (a) of this section will not apply to any significant guidance document or categories of significant guidance documents for which OBPA finds, in consultation with OIRA, the proposing agency, and the Office of the Secretary, good cause that notice and public comment thereon are impracticable, unnecessary, or contrary to the public interest (and incorporates the finding of good cause and a brief statement of reasons therefor in the guidance document issued).

(c) Where appropriate, the proposing agency may recommend to OBPA that a particular guidance document that is otherwise of importance to the Department's interests shall also be subject to the informal notice-and-comment procedures described in paragraph (a) of this section.

§ 1.907 Petitions for guidance.

Any person may petition a USDA agency to withdraw or modify a particular guidance document. Petitions may be submitted by postal mail to: Guidance Officer, Office of Budget and Program Analysis, USDA, 1400 Independence Avenue SW., Washington, D.C. 20250-1400. Email petitions may be sent to guidance.inquiries@usda.gov. The agency shall respond to all requests in a timely manner, but no later than 90 days after receipt of the request.

§ 1.908 Rescinded guidance.

No USDA agency may cite, use, or rely on guidance documents that are rescinded, except to establish historical facts.

§ 1.909 Exigent circumstances.

In emergency situations or when the issuing agency is required by statutory deadline or court order to issue guidance documents more quickly than this subpart's review procedures allow, the issuing agency shall coordinate with OBPA to notify OIRA as soon as possible and, to the extent practicable, shall comply with the requirements of this subpart at the earliest opportunity. Wherever practicable, the issuing agency shall schedule its proceedings to permit sufficient time to comply with the procedures set forth in this subpart.

§ 1.910 Reports to Congress and GAO.

Unless otherwise determined in writing, it is the policy of USDA that upon issuing a guidance document determined to be "significant," the issuing agency shall submit a report to Congress and the Government Accountability Office in accordance with the procedures described in 5 U.S.C. 801 (the Congressional Review Act).

§ 1.911 No judicial review or enforceable rights.

This subpart is intended to improve the internal management of USDA. As such, it is for the use of USDA personnel only and is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its agencies or other entities, its officers or employees, or any other person.

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